



Date: February 23, 1998

Case No.: 97-INA-151

In the Matter of:

U.S.A. Gateway Travel & Tours, Inc.
Employer,

On Behalf of:

Tong Han
Alien.

APPEARANCE: Alan Lee and Janet S. Horn
New York, New York
For Employer and Alien

BEFORE: Burke, Vittone, and Guill
Administrative Law Judges

DECISION AND ORDER

Per Curiam

This case arose from an application for labor certification on behalf of Alien, Tong Han, ("Alien") filed by Employer, U.S.A. Gateway Travel & Tours, Inc., ("Employer"), pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, New York, denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On October 9, 1995, Employer filed an application for labor certification to enable Alien to fill the position of Senior Travel Consultant. (AF 91-99).

The CO issued a Notice of Findings (“NOF”) on August 8, 1996, proposing to deny certification on several grounds, including that the requirement of a Bachelor’s degree and one year of experience is above the maximum years of education and experience required for this position based on the DOT. (AF 66-70).

Employer submitted its rebuttal on September 18, 1996. (AF 10-65). Employer asserted that the requirement is a minimum requirement and that the job duties are complex because the position is a Senior Travel Consultant. These duties include:

providing individual clients and tour groups travel advice and consultation concerning Chinese history, culture, art local customs, local laws and regulations as well as information as to the scenic spots and historical sites in China. The employee is responsible for assisting the manager in analyzing market potential to develop our sales and for developing new tours. The employee needs to employ his or her knowledge of marketing and consumer psychology in order to design and organize tours and conduct public relation efforts to enlarge our business scope in China and the United States. The employee studies the demographic distribution of customers as categorized by geographic area, for example. The employee then analyzes this information to ascertain the changes and shifts in the tourism market.

(AF 14-15). Employer’s other arguments for the requirement go beyond the scope of exceeding the DOT and into the requirement of having a specific major for the Bachelor’s degree. *Id.*

The CO issued the Final Determination (“FD”) on October 9, 1996, denying certification because Employer failed to document the business necessity of the unduly restrictive education and experience requirements. (AF 8-9).

On November 4, 1996, Employer filed a response to the request for reconsideration and on December 23, 1996, the CO forwarded the record to this Board of Alien Labor Certification Appeals (“Board”).

DISCUSSION

The DOT states that the SVP for the position of Travel Agent is five.¹ A position with an SVP of five means the maximum education, training, and experience required cannot exceed one year. Here, Employer is requiring the equivalent of three years. If employer insists on a requirement above the DOT classifications, he must establish business necessity for it. The standard for business necessity was established in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989).

¹DOT code 252.152.010.

The *Information Industries* standard requires that the employer show:

- (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and
- (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

The requirement of a Bachelor's degree in Travel and Tourism or History may bear a reasonable relationship to the occupation in the context of Employer's business in this case. Therefore, Employer must document that the required degree relates directly to the performance of the listed job duties. *ARCO Oil & Gas Co.*, 89-INA-295 (May 22, 1991)

The SVP requirement in the DOT is over six months up to and including one year of experience, education, and/or training. In this case, Employer only provided undocumented assertions with respect to its position that a Bachelor's degree is essential to performing the job duties described in the ETA 750-A. Although written assertions constitute documentation that must be considered under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*), bare assertions without supporting reasoning or evidence are generally insufficient to carry an employer's burden of proof. Employer provides no reasons as to why an applicant without a Bachelor's degree could not perform the listed job duties of "providing travel advice and consultation concerning Chinese history, culture, art local customs, local laws and regulations as well as information as to the scenic spots and historical sites in China . . . assisting the manager in analyzing market potential . . . and employing his or her knowledge of marketing and consumer psychology in order to design and organize tours and conduct public relation efforts to enlarge our business scope in China and the United States." Along the same line, Employer provides no reasons as to why someone with a Bachelor's degree would necessarily be better able to perform these duties. Certification is properly denied where the CO finds that the employer failed to establish why an employee having experience in the job skills could not perform the job as well as a person with the educational degree sought. *Bankers Trust Company*, 94-INA-265 (May 30, 1995).

Furthermore, in its request for review, Employer's counsel argued that the DOT code, and hence the SVP of five, assigned to this position does not take into account the "different complexities of task." (AF 2). Employer's counsel asserted that the job duties of this position are different from those listed in the DOT and, therefore, a higher degree of education and experience are necessary to perform the job duties. However, the job duties listed in the DOT description encompass nearly all of the duties listed on the ETA 750-A. Additionally, counsel also failed to provide reasons why someone with a Bachelor's degree in Travel&Tourism or History would be better able to perform the job duties.

We find that the CO correctly classified this position as a Travel Agent and found that the education and experience requirements exceed the maximum years of education and experience

required for this position based on its DOT classification. Accordingly, the following Order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the Panel:

TODD R. SMYTH
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.